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IN THE SUPREME COURT

Of The

United States

October Term, 1982

MICHAEL WARREN COLETTA, JOHN A. WILMS, HERVE BITTON, HERNAN CASTRO

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether white males have standing to challenge discrimination in the selection of grand jury foremen in federal criminal trials?

2. Whether a federal criminal indictment must be dismissed where uncontradicted evidence shows that the Administrator of the DEA has improperly refused to reclassify cocaine into a different schedule of the Controlled Substances Act?

3. Whether a warrantless search and seizure conducted under the "incident to arrest" exception to the Fourth Amendment's warrant requirement must be contemporaneous with that arrest?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties, other than petitioners, in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Ninth Circuit

The petitioners, Michael Warren Coletta, John A. Wilms, Herve Bitton, and Hernan Castro, respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on July 29, 1982 (Petition For Rehearing denied September 2, 1982).

OPINIONS BELOW

The District Court issued no opinion nor oral findings of fact nor conclusions of law in denying defendants' motion to dismiss the Indictment, nor defendant Coletta's motion to suppress evidence. The opinion of the Court of Appeals now reported at 682 F.2d 820 (1982), appears as Appendix A. The Order of the Court of Appeals dated September 2, 1982, denying the Petition for Rehearing appears as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on July 29, 1982. Petitioners timely petition for rehearing was denied on September 2, 1982. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2 of the

United States Constitution provides in pertinent part:

> "The Judicial power [of the United States] shall extend to all Cases, in Law, and Equity, arising under this constitution [and] the laws of the United States ...
>
> "...
>
> "The Trial of all Crimes ... shall be by jury ..."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person ... be deprived of life, liberty, or property, without due process of law ...."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ..."

Various sections of the Jury Selection and Service Act of 1968 (28

U.S.C. §1861 et seq) apply to the grand jury foremen selection issue raised by this Petition. In particular, §1861 provides, in relevant part, that it shall be

> "The policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to grand and petit jurors selected at random from a fair cross-section of the community .... All citizens shall have the same opportunity to be considered for service on grand and petit juries ...."

28 U.S.C. §1862 provides that:

> "No citizen shall be excluded from service as a grand or petit juror in the District Court of the United States on account of race, color, religion, sex, national origin or economic status."

Various sections of the Controlled Substances Act (hereafter the "CSA") are necessarily involved in this action. The particular provisions most directly involved, which are set out in full in Appendix C, are portions of 21 U.S.C. §§811, 812, 841, and 877.

STATEMENT

1. On May 8, 1981, the federal grand jury for the Northern District of California indicted petitioners[1/] for conspiring to distribute cocaine in violation of Title 21 U.S.C. §846; in addition, petitioner Coletta was accused of possessing cocaine for distribution in violation of 21 U.S.C. §841(a)(1). Prior to trial, petitioners challenged the indictment returned against them on several grounds, including the two presented here: first, that the selection of grand jury foremen by district judges in the Northern District of California violated the Jury Selection Act by the protections of the Fifth Amendment in that Caucasian males accounted for 25 of the 28 of the grand juries empaneled from

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1/ A fifth individual, CARLOS CASTRO, was indicted and convicted along with petitioners, but did not challenge his conviction on appeal.

January 5, 1977, to June of 1981 (of the remaining three, only two were women and one might have been Hispanic; no black or Asian was ever selected). Second, that developments in the state of scientific and medical knowledge since the enactment of the CSA in 1970 had rendered the original classification of cocaine in Schedule II of that Act invalid. Further in light of equally significant development in the procedural and substantive law applying to Administrative actions, the refusal of the Administrator of the DEA to carry out his statutorily mandated duty to reclassify controlled substances in such circumstances denied petitioners due process of law, and, for the reasons set out more fully below, rendered the Indictment invalid.

In addition, defendant Coletta moved to suppress the warrantless search and seizure of a travel bag removed from

the stationery car in which he was sitting at the time of his arrest, but not opened and searched and until the drug agents returned to their office, substantially later in time and removed in place from the place of arrest.

2. Because all the defendants were white males, the District Court determined, without oral or written conclusions of law or citation of authority, that they did not have standing to raise the question of alleged discrimination in the selection of the grand jury foreman. Accordingly, their motion challenging the Indictment on this ground was denied.

3. Finally, defendants made an extensive Offer of Proof which, briefly stated, alleged that scientific and medical evidence developed since the Congress placed cocaine in Schedule II (in 1970) rendered cocaine's continued classification in Schedule II invalid under

each of the criteria set out in 21 U.S.C. §812. Although the government never contested any of the substantive allegations contained in defendants' Offer of Proof, and although defendants stressed at the outset that they were challenging neither the validity of the Congressional placement of cocaine in Schedule II nor the constitutionality of the delegation of the power to reclassify to the Administrator, the Court denied the defendants' motion without comment.

4. With respect to the seizure of cocaine from the travel bag, the facts which were not in dispute at the suppression hearing showed that pursuant to a pre-arranged plan, defendant Coletta and an undercover informant posing as the purchaser of drugs were sitting in Coletta's car parked in a supermarket parking lot, with a partially opened travel bag sitting in the back seat. Also by prior arrangement, when the DEA

officer approached the car and was signaled by the informant that the transaction had occurred, the agent immediately placed Coletta under arrest and removed him from the car. Once Coletta was removed from the car and handcuffed and taken out of harm's way, the agent removed both his travel bag as well as the informant's bag from the car. Instead of searching Coletta's bag at the scene, the agent closed it and took it to his office where, sometime later, he reopened it and removed the bags containing the cocaine from its interior.

BASIS FOR FEDERAL JURISDICTION

Because this is a federal criminal prosecution, 18 U.S.C. § 3231 conferred original jurisdiction on the district court.

REASONS FOR GRANTING THE WRIT

1. The Ruling By The Court Of Appeals That White Males Lack Standing To Challenge Discriminatory Process For

The Selection Of Grand Jury Foremen Requires This Court To Settle A Conflict Between Circuits, And To Resolve An Important And Undecided Question Of Federal Law.

Although this Court has decided six major cases dealing with the question of alleged discrimination in the selection of grand and petit juries since 1972, [2/] the precise question here has never been decided: may white males challenge an Indictment returned by grand juries, the foremen of which were selected in a manner which discriminated against minorities, including blacks, Asians, Mexican-Americans, and women? Language in this Court's opinions points in different directions. In Peters, supra, the Court held that the existence of constitutional violations in the grand

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2/ See Alexander v. Louisiana, 405 U.S. 625 (1972); Peters v. Kiff, 407 U.S. 493 (1972); Taylor v. Louisiana, 419 U.S. 522 (1975); Castaneda v. Partida, 430 U.S. 482 (1977); Duren v. Missouri, 439 U.S. 357 (1979); Rose v. Mitchell, 443 U.S. 545 (1979).

jury selection process "does not depend on the circumstances of the person making the claim." 407 U.S. at 498. In Castaneda, however, the Court employed language suggesting that a defendant objecting to the jury selection process must show "underrepresentation of his race or of the identifiable group to which he belongs." 430 U.S. at 494. Finally, in Rose v. Mitchell, the Court pointed in both directions at the same time. First, the Court repeated the language of Peters that it "has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposely have been excluded." 443 U.S. at 556. Later in that same opinion, the Court repeated the Castaneda language, emphasizing the need of a defendant to belong to the class being discriminated against.

Thus far, two Courts of Appeals have passed on the question presented here. In United States v. Perez-Hernandez, 672 F.2d 1380 (1982), the Court of Appeals for the Eleventh Circuit concluded that the apparent conflict in the language just cited does nothing to undercut the "clear and unambiguous" holding in Peters that "has never been expressly overruled," especially since the language in Rose was dicta by virtue of the fact that the petitioners there were black and were challenging discrimination against their own race. 672 F.2d at 1386. In the instant case, the Ninth Circuit, with only passing reference to Perez-Hernandez, reached exactly the opposite conclusion. This conflict, regarding a crucial question of constitutional criminal law, requires resolution by this Court.

Petitioners suggest that the Ninth Circuit erred in distinguishing the two different facets of the law of standing which have been fashioned by the federal courts to deal with important questions emanating from the limited powers and jurisdiction conferred on such courts by the constitution. See Barows v. Jackson, 346 U.S. 249, 255-256 (1953); Warth v. Seldin, 422 U.S. 490 (1975); and Sedler, "Standing To Assert Constitutional Jus Tertii In The Supreme Court," 71 Yale L.Rev. 599 (1962). Briefly stated, the Court of Appeals confused constitutional standing, which derives from the requirement of Article III that an actual "case for controversy" be presented for decision, with the "judicial limitations" which the federal courts have imposed upon themselves as to how they will exercise constitutional jurisdiction which they in fact possess.

That is, the Court of Appeals confused the standing of a party to bring a suit with the standing of a party to a suit already brought to contest the action against him on particular grounds. See Sedler, supra, at 599. Indeed, all of the "equal protection cases" which preclude members of a class not subject to discrimination from seeking -- as plaintiffs -- to enforce rights of the class being discriminated against are totally inapplicable to the inquiry here. As the Eleventh Circuit correctly concluded, no compelling reasons exist for the federal courts to limit the ambit of their inquiry into allegations of discriminatory selection of grand or petit juries, or their officers. Accordingly, this Court should grant certiorari, reverse the rulings below, and order that an evidentiary hearing be held to determine whether or not the prosecution can rebut the strong

prima facie case of discriminatory selection established by petitioners below.

2. Given Uncontradicted Evidence That Scientific Developments Require Reclassification Of Cocaine Under The Terms Of The CSA, The District Court's Denial, Without Hearing, Of The Motion To Dismiss The Indictment Violated Rights Guaranteed By The Due Process And Indictment Clauses Of The Fifth Amendment As Well As The Fair Trial Guarantee Of The Sixth Amendment.

A. Two points must be made prior to discussion of the issue presented in petitioners' misclassification attack on the Indictment. First, contrary to statements made in the Ninth Circuit opinion, petitioners did not challenge the constitutionality of the CSA, the original placement of cocaine in Schedule II by the Congress, nor the delegation of the power (and the duty) to reclassify drugs as scientific knowledge can prove to the DEA Administrator. Indeed, petitioners contend that the unbroken chain of cases upholding the validity of the

Act, and the original classification not only supports their view that the Administrator has acted improperly in not reclassifying, but indeed, virtually compels that very conclusion. See NORML v. DEA, 559 F.2d 735 (D.C. Cir. 1977); United States v. Kiffer, 477 F.2d 347 (2nd Cir. 1973); United States v. Castro, 401 F.Supp. 120 (N.D. Ill. 1975).

Second, and again contrary to statements made in the Ninth Circuit opinion, defendants' Offer of Proof specifically alleged the scientific evidence would show that under each and every criteria of §812, particularly including effects on the public health and the potential of a drug for abuse, cocaine may not properly be retained in Schedule II. To understand why this is so, a brief overview of the structure and purpose of the Act is necessary.

Most important to note is that the CSA was designed to deal in a

coordinated fashion with a perceived drug problem in the United States by establishing rehabilitation programs relating to drug abuse (Title 1); by providing authority for the Department of Justice with respect to law enforcement aspects of drug abuse (Title 2); and by regulating the importation and exportation of drugs subject to abuse (Title 3). See 1970 U.S. Code Cong. & Ad. News, p. 4568.

Central to the Act was the regime by which substances could be added, removed, or reclassified within controlled substance "schedules." The CSA contains five categories of controlled substances, designated as Schedules I-V, and the schedules are ranked on the basis decreasing harmfulness at each level, measured against increasing benefits for the user. See 21 U.S.C. §812(b) (1-5), infra, Appendix C. And see, e.g., NORML v. DEA, 559 F.2d 735, 737 (D.C. Cir. 1977). Moreover, the regulatory controls

and criminal penalties imposed on the manufacture, acquisition, and distribution of substances listed under the CSA vary enormously in proportion to the schedule in which the drug is placed.

Congress recognized that as scientific knowledge concerning the effects of various controlled substances improves, the initial drug classifications in the Act would have to be changed. Accordingly, it gave the Attorney General the power to change the schedules of controlled substances (see 21 U.S.C. §811, infra, Appendix C). In order to assist the Attorney General in this task, the Congress authorized him to carry out educational and research programs to develop the information necessary to perform his rescheduling functions under Section 811 [see 21 U.S.C. §872(a)(6)], and provided guidelines to him for use in determining into which schedule a controlled substance should be

placed. See 21 U.S.C. §811(c), infra, Appendix C, for a listing of the eight factors to be considered in determining the control decision.

The legislative history of the CSA, and particularly the testimony of then-Attorney General Mitchell and then-director of the Bureau of Narcotics and Dangerous Drugs (BNDD) Ingersoll, make clear that the theory and structure of the Controlled Substances Act was guided by three overriding principles: first, the creation of five tiers of controls (codified in the five schedules of 21 U.S.C. §812) was designed to insure both actual fairness (in the sense that offenses and offenders of varying degrees of severity would be dealt with by means of graduated penalties) and the appearance of fairness (in the sense that judges, prosecutors, and the public would perceive that the penalty fits the crime in as many senses of that word as are

are possible). Second, the stress upon scientific criteria and constant updating and republishing of the schedules are designed to insure that the classification and penalty structure was rational and credible, in the sense that the classification of drugs into one or more of the various schedules conformed to the best available scientific knowledge as to the relative harmfulness and benefit of such substance. Third, and in the eyes of the sponsors of the legislation, the most important feature of the CSA, was the granting of discretion to the Attorney General to move drugs between one schedule or another. (Section 811; the statute provides that the Attorney General shall add or move a drug from the Schedules if he determines that certain factors are present but merely may transfer drugs from one schedule to another in light of new evidence.)

As Mr. Ingersoll explained

in his testimony introducing the Controlled Substances Act:

> "Perhaps the greatest advantage to this approach is that drugs may be moved from one schedule to another as scientific information and law enforcement problems come to light ... by giving the Attorney General this discretion, the Congress will permit a quick response to the ever-changing drug problem based upon relative harm and relative abuse potential of existing drugs and newly discovered drugs."
>
> Testimony of John Ingersoll at the Hearing of the Subcommittee to Investigate Juvenile Delinquency on the Committee of the Judiciary, September 15, 1969, at p. 214.

If petitioner's contention is correct (that the "imposing corrective mechanism"[3/] of the CSA is central both to its validity as legislation and to the

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3/ See United States v. Kiffer, supra, 477 F.2d at 357; United States v. Castro, supra, 401 F.Supp. at 27, for lucid analyses sustaining drug classifications against "minimum rationality" challenges precisely because the Congress provided a means to change classifications as knowledge about drugs improves.

validity of the manner in which it is implemented), the question presented by the district court's refusal to entertain his challenge to the administration of the Act boils down to this: May a defendant in a criminal case be prevented from challenging the Administrator's failure to reclassify a controlled substance as part of his defense to the charges against him? Petitioner submits that the answer must be no, because the rights to due process of law and fair trial guaranteed by the Fifth and Sixth Amendments, and the Cases and Controversies provision of Article III of the Constitution,[4/] preclude the imposition of the criminal sanction --

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[4/] See the celebrated "Dialogue" of Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1632, and reprinted in Hart & Wechsler, The Federal Courts And The Federal System (2nd ed. 1973), Page 330. See also Tribe, American Constitutional Law (1978), at Pages 37 and following.

indeed, preclude even the exercise of jurisdiction -- unless two conditions are met: First, the legislature must have prescribed a definite penalty (just as it must have proscribed clearly defined conduct); second, the defendant must be permitted to place in issue every element necessary to prove his guilt.

B. Petitioner argued below that a determination by the trial court that the current classification of cocaine is improper would require dismissal of the indictment, because the proper classification would then be uncertain; since this classification in turn determines the range of penalty which may be imposed by the court, prosecution under 21 U.S.C. § 841(b)(1)(A) would violate the fundamental principle of Anglo-American criminal law: nulla poena sin lege -- no

punishment without law.[5/]

> "[A] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime."
>
> LaFave and Scott, Criminal Law (1972), p. 8; See also H. Packer, The Limits of the Criminal Sanction (1968), p. 19; J. Hall, General Principles of Criminal Law (2d ed. 1960), P. 18; R. Perkins, Perkins on Criminal Law (2nd ed. 1969), Pp. 8-9.

The reason, indeed the necessity, for the rule that where the penalty is uncertain, no prosecution may be had, is a product of the reaction of colonial America to the excesses and oppressions effected by the King's judges during the Seventeenth and early Eighteenth Centuries. See Nelson, Americanization of the Common Law: The Impact of Legal

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[5/] This principle descends directly from the Magna Carta: "No freeman shall be taken, or imprisoned, or disseised [dispossessed] or outlawed, or exiled, or anywise destroyed; not shall we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Magna Carta, Clause 39 (12 Am.Jur., Constitutional Law, Section 568, p. 261).

Change on Massachusetts Society, 1760-1830 (1975); Horwitz, The Transformation of American Law, 1780-1860 (1977), particularly pp. 1-10. The experience of colonial Americans was that the General Courts, which served as the principal link between the provincial governments and local communities, and which combined vast coercive powers covering criminal, administrative, and civil jurisdictions, posed too great a threat to liberty to be retained in the new republic. Accordingly, the Americans came to agree that,

> "Those who "executed the Law ought not to enquire into .... its Reason and Policy" but ought merely "to enquire what is Law, and see that Laws are informed," for to permit courts to determine policy would introduce "a Union of Legislative and Executive Power" -- "the worst Sort of Tyranny" .... Colonial Americans, in sum, wanted to be ruled by fixed law, not powers that could be used by potentially arbitrary rulers.
>
> Nelson, supra, at p. 18, quoting Josiah Quincy, "Charge to the Grand Jury, "Reports of

Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, (1865).

That is, a momentous and far-reaching war was waged in and around the political institutions of post-independence America, in which the point of controversy was the extent to which the common law of England should be "received" into our substantive and procedure law -- indeed into the very framework of our judicial and political institutions. Perhaps by accident, perhaps not, the reception controversy came to a head in United States v. Hudson & Goodwin, 7 Cranch 32, 3 L.Ed. 259 (1812):

> "The constitutional objection to common law crimes boiled down to the assertion that if the federal judiciary possessed jurisdiction to impose criminal sanctions without a statute it would be able to obliterate all constitutional limitations on the federal government. If the principle were to prevail, Thomas Jefferson wrote in 1800,

> "of a common law being in force in the United States" it would "possess .... the general government at once of all the powers of the State Governments and reduce .... us to a single consolidated government."

Horwitz, supra, p. 10.

In Hudson & Goodwin, the defendants had been convicted of libeling the President and the Congress by publishing an article in a Connecticut newspaper accusing the Chief Executive and the entire membership of attempting to bribe Napoleon Bonaparte (with a two million dollar "present") to make a treaty with Spain. In upholding a demurrer to the indictment, the Supreme Court stated:

> "The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases .... Although this question is brought up now for the first time to be decided by this court, we consider it as having been long settled in public opinion .... The only ground on which it has ever been contended that [the jurisdiction of the federal courts to define crimes or punishments] could be maintained is, that, upon the

> formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it .... But .... if [this argument] may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.
>
> 7 Cranch, at pp. 32-34 (emphasis added).

Over 100 years later, the Court of Appeals for the Second Circuit dismissed an indictment brought under a provision of the National Defense Act (chapter 53, 40 Stat. 276, August 10, 1917) which made it "unlawful" to hoard sugar or other "necessaries" which were in short supply during World War I. Mossew v. United States, 266 F. 18 (2nd Cir. 1920). The statute in question,

however, specified no punishment, and the court, relying on Hudson & Goodwin, held that "By failure to provide a penalty for infraction of this statute, or to prescribe a punishment, the statute does not denounce the act as criminal." Id. at 22.

More recently, this Court took up the punishment dimension of federal criminal jurisdiction in a setting more similar to that presented here -- that is, where Congress clearly intended to criminalize conduct and provide a penalty therefor, but where, for some reason, the applicable penalty is later seen to be uncertain. In United States v. Evans, 333 U.S. 483 (1948), the Court upheld the dismissal of indictments brought under the Immigration Act of 1907, as amended in 1917 (34 Stat. 900, 1907, 39 Stat. 880, 1917, 8 U.S.C. Section 144). An "unusual and difficult problem in statutory construction" arose because the amendment adding "harboring and

concealing" left it unclear whether the punishment (one year) and penalty ($2,000) provisions could apply to each separate act. As the Court described its dilemma:

> "The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting at least three, and perhaps four, possible yet inconsistent answers ....
>
> 333 U.S. at 484 (emphasis added).

After noting that "every reasonable presumption attaches to ...." require the courts to effectuate the Congressional purpose, the court held that "there are limits beyond which we cannot go . . ." Id. Again noting Hudson & Goodwin, it reaffirmed the principle that where the penalty attached to proscribed conduct is uncertain, criminal jurisdiction does not lie.

Although the uncertainty of penalty in the statutory setting at issue here arises in a different manner than it did in Evans, the resulting problem is exactly the same: once the present classification has been invalidated, it lies beyond the power of this Court to re-classify cocaine into Schedule III, IV, or V. Consequently, since the possible penalty for any violation turns on such reclassification, the problem is also "one of multiple choice, presenting at least three ... possible yet inconsistent answers ... ." Id.

Finally, if one of the two prerequisites of a crime, within the meaning of the Anglo-American system of justice, is found lacking, the indictment clause of the Fifth Amendment precludes any trial on the merits, for that clause is jurisdictional:

> "[If an indictment is improperly amended], it is no avail ... to say that the court

> still has jurisdiction of the person and the crime, for, though it has possession of the person and would have jurisdiction of the crime, if it were properly presented by an indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."
>
> Ex parte Bain, 121 U.S. 1, 11 (1886)

If a valid indictment is jurisdictional, and if a plea of not guilty puts every issue in doubt, it necessarily follows that a defendant must be afforded a meaningful opportunity to challenge any essential element of the indictment brought against him. In this context,

that means that Petitioner has an absolute right to a ruling on the merits of his challenge to the classification of cocaine. To deny him this right is to violate the Fifth Amendment's guarantee.

3. The Opinion Of The Court Of Appeals Sustaining A Non-Contemporaneous Search Incident To Arrest Violates Law Established By This Court And Blurs The Distinction Between Such ("Belton") Searches And Automobile ("Ross") Searches.

In New York v. Belton, 453 U.S. _____, 69 L.Ed 769 (1981), this Court established a new "bright-line" test for warrantless searches conducted incident to the arrest of persons driving automobiles. As the Court itself characterized Belton, that case

> "presents the volatile and fluid situation of an encounter between an arresting officer and a suspect apprehended on the public highway ... Practical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make

> close calculations about danger to himself or the vulnerability of evidence."
>
> Robbins v. California, ___ U.S. ___, 69 L.Ed.2d 744, at 753 (Powell, J., concurring) (1981).

Thus, after Belton, "when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Belton, supra, 69 L.Ed 2d, at 775.

This past term the Court established another bright-line test to deal with the question of the so-called "automobile exception" to the Fourth Amendment. See United States v. Ross, ___ U.S. ____, 72 L.Ed.2d 572 (1982). In essence, Ross teaches that where the automobile exception applies, any part of an automobile and any container inside it may be searched without a warrant or, apparently, without limitations. The

problem presented by this case is the gap which clearly exists between the bright-lines of Ross and Belton.

Simply put, the question presented here is whether a search incident to arrest, such as occurred here, must be contemporaneous with that arrest; if so, the search here was improper, because the search and seizure of the contents of the travel bag was not made until the DEA agent had returned to his office, some distance and some time away. If, however, the automobile exception applies, then non-contemporaneous searches have been authorized by this Court.

Under the facts of this case, however, it is clear that the search conducted was incident to petitioner Coletta's arrest, not pursuant to probable cause to search Mr. Coletta's car, as is easily seen from analysis

of the underpinnings of the "automobile" exception.

As this Court has repeatedly taught, the initial inquiry, that is to say the threshold question for the automobile exception analysis, is not whether a car may be searched but whether it may be stopped for the purpose of a search as it moves on the public highways. See Brinegar v. United States, 338 U.S. 160, 176-177 (1949);

> "[N]o problem of searching ... was presented either in [Carroll v. United States, 267 U.S. 132 (1925)] or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements. In such a case the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference."

That is, only after an auto stop occurs does the problem addressed in Ross--the scope of the search--comes to

the fore. Because the facts showed that, by prior arrangement, the informant was to give the signal for Coletta's arrest only after the informant had put the cocaine in his bag, no question of a search is presented; rather, Coletta was to be arrested, thus triggering the "incident to" exception. Thus, the validity of the police actions here must be analyzed pursuant to the contemporaneity requirement of Ross. Unless and until this Court rules that a contemporaneous search is not required incident to arrest, the seizure made here must be deemed illegal and the evidence ordered suppressed.

CONCLUSION

For the reasons stated above, this Court should grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and review

and reverse the judgments entered by that Court.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

Stephen J. Heiser, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within:

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For the Ninth Circuit

on November 1, 1982. Service was made upon counsel for Respondent at the following addresses:

REX E. LEE
Solicitor General of the United States
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Washington, D.C. 20530

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All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 1982, at San Francisco, California.

STEPHEN J. HEISER